No. 90-6282

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DANIEL TOUBY and LYRISSA TOUBY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Controlled Substances Act, as amended, unconstitutionally concentrates in the Attorney General the unreviewable power to criminalize conduct involving previously lawful drugs.

2. Whether, under the Controlled Substances Act, as amended, the Attorney General properly subdelegated his unreviewable power to criminalize new drugs to the Administrator of the Drug Enforcement Administration.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Constitutional Provisions

Statutes

Congressional Materials

Regulations, Rules, and Administrative Materials

Other Authorities

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 909 F.2d 759 and is reprinted at J.A. 27. The opinion of the United States District Court for the District of New Jersey is reported at 710 F. Supp. 551 and is reprinted at J.A. 2.

JURISDICTION

The court of appeals entered judgment on July 27, 1990. A timely petition for rehearing was denied on August 21, 1990. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

The pertinent provision of the Controlled Substances Act, as amended, 21 U.S.C. § 811(h), and the pertinent federal regulation, codified at 28 C.F.R. § 0.100(b), are set forth in the appendix to this brief.

STATEMENT

In 1987, the drug 4-methylaminorex was temporarily classified as a Schedule I controlled substance, making its possession, manufacture, or distribution a federal crime. That decision, which criminalized previously lawful conduct, was not made by Congress but by the Administrator of the Drug Enforcement Administration (DEA), acting pursuant to a purported subdelegation of the authority that Congress had delegated to the Attorney General under the Controlled Substances Act, as amended, 21 U.S.C. § 811(h). That provision permits the Attorney General, in his sole and unreviewable discretion, to classify drugs as unlawful for a period of up to eighteen months, and thereby define the crimes he then prosecutes.

Petitioners Daniel and Lyrissa Touby were convicted of manufacturing and of conspiring to manufacture Euphoria, in violation of 21 U.S.C. §§ 841(a)(1) and 846. They were sentenced, respectively, to 42 and 27 months' imprisonment. Petitioners challenge both the constitutionality of Congress's grant of this crime-defining power to the Attorney General and the validity of the DEA Administrator's exercise of that power by purported subdelegation.

A. The Controlled Substances Act

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970). Title II of the statute was designated the Controlled Substances Act ("the Act"), now codified at 21 U.S.C. §§ 801-904. The Act prohibits the

possession, manufacture, or distribution of a "controlled substance," 21 U.S.C. § 841(a)(1), and specifies five categories in which such drugs can be classified, 21 U.S.C. § 812(a). Those categories, or "schedules," carry different criminal penalties, the least severe for Schedule V, the most severe for Schedule I. Classification into Schedule I depends on a drug's relative safety for use, its potential for abuse, and its current medical uses in the United States, if any. 21 U.S.C. § 812. Classification into Schedules II through V depends on those factors as well as on a drug's relative potential to cause physical or psychological dependence.

Congress initially enumerated the drugs falling within each of the five schedules. 21 U.S.C. § 812(c). It also authorized the Attorney General to modify the schedules —to add and remove drugs, as well as to transfer drugs among the schedules—on a permanent basis. 21 U.S.C. § 811(a). That authority must be exercised in accordance with several specific congressional requirements.

To begin with, the Attorney General cannot act unilaterally. Before the Attorney General may even initiate scheduling proceedings, the Secretary of the Department of Health and Human Services ("HHS") must perform a scientific and medical evaluation of the drug at issue and render a formal, written report and recommendation on its proper classification. 21 U.S.C. § 811(b). The Secretary's recommendation binds the Attorney General on the scientific and medical status of the substance, and any recommendation by the Secretary *not* to schedule a drug precludes the Attorney General from ordering otherwise. *Ibid.*

Even with a favorable scheduling recommendation from the Secretary, moreover, the Attorney General may permanently schedule a drug only upon finding that it has a potential for abuse and that it meets the additional requirements for the proposed schedule. 21 U.S.C. § 811(a)(1). Schedule I, for example, requires a determina-

tion that the drug (1) has a high potential for abuse, (2) has no currently accepted medical use in treatment in the United States, and (3) is not accepted as safe for use under medical supervision. 21 U.S.C. § 812(b). Those findings, in turn, must rest on consideration of eight specific factors, including, *inter alia*, the drug's actual or relative potential for abuse and any known scientific evidence of its pharmacological effect. 21 U.S.C. § 811(c).[1] Finally, the Attorney General's evaluation of these substantive criteria must be undertaken pursuant to the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, thereby ensuring that permanent scheduling orders are subject to judicial review. 21 U.S.C. § 811(a).

B. The Addition of the Temporary Scheduling Power

In 1984, Congress amended the Controlled Substances Act to add a temporary scheduling power to the Attorney General's authority to criminalize particular drugs. Dangerous Drug Conversion Control Act of 1984, Pub. L. No. 98-473, codified at 21 U.S.C. § 811(h). Recognizing that the permanent scheduling procedures can take up to a year to complete, and concluding that faster action was sometimes needed, Congress empowered the Attorney General temporarily to place a previously lawful (unscheduled) drug in the most severe category, Schedule I, without "await[ing] the exhaustive medical and scientific determinations ordinarily required when a drug is

[1] The Attorney General must also consider these additional factors: (1) the state of current scientific knowledge concerning the drug; (2) its history and current pattern of abuse; (3) the scope, duration, and significance of abuse; (4) what, if any, risk the drug poses to the public health; (5) its psychic or physiological dependence liability (how addictive it is); and (6) whether the substance is an immediate precursor of a drug already controlled under the statute. 21 U.S.C. § 811(c). The Secretary of HHS must likewise consider the scientific and medical considerations inherent in all of the factors when evaluating a drug and formulating a recommendation to the Attorney General. 21 U.S.C. § 811(b).

being considered for control." S. Rep. No. 225, 98th Cong., 2d Sess. 265, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3447. A temporary scheduling order expires at the end of twelve months, but it can be extended for six months if the Attorney General has commenced permanent scheduling procedures under Section 811(a). 21 U.S.C. § 811(h)(2). During the time that a drug is temporarily scheduled, a conviction for its possession, manufacture, or distribution carries the same penalty as a violation involving a permanent Schedule I drug.

Under this new grant of power, the Attorney General need only find that designating a drug under Schedule I is "necessary to avoid an imminent hazard to the public safety." 21 U.S.C. § 811(h). That decision is to be made by the Attorney General in his unfettered discretion. Thus, Congress expressly exempted temporary scheduling orders from judicial review. 21 U.S.C. § 811(h)(6) ("An order issued under paragraph (1) is not subject to judicial review.") And the Secretary of HHS plays no necessary role: although he must be given notice of the Attorney General's intent to schedule a drug temporarily, the Secretary is not required to respond, let alone perform any scientific or medical evaluation; and if the Secretary does respond, the Attorney General need only consider the response, but is not bound by it. 21 U.S.C. § 811(h)(4).

The procedures for temporary scheduling, moreover, need not follow the procedures generally applicable to formal rulemaking. Instead, the Attorney General is required only to publish a notice of intent to schedule a drug and is barred from issuing a final order until 30 days after that publication. 21 U.S.C. § 811(h)(1). The substantive criteria for temporary scheduling are likewise truncated. Thus, in lieu of the eight factors that govern permanent scheduling, *see* page 4 & n.1, *supra*, the finding of an imminent public hazard needs to rest on only three: (1) the drug's history and current pattern of

abuse; (2) the scope, duration, and significance of its abuse; and (3) what, if any, risk the drug poses to the public health. *Ibid.*[2]

C. The Subdelegation and Classification Decisions

Congress did not explicitly authorize the Attorney General to subdelegate to any other official the unreviewable authority—granted by Section 811(h) to "the Attorney General"—to define crimes by temporary scheduling. Nevertheless, in 1987, the Attorney General revised a previous regulation and subdelegated to the DEA Administrator all of the Attorney General's functions under the 1970 Act "as amended," except those specifically reserved or otherwise assigned. 28 C.F.R. § 0.100(b). That action, which did not mention the temporary scheduling authority of Section 811(h), was taken in reliance on general grants of subdelegation authority in 28 U.S.C. § 510 and 21 U.S.C. § 871(a). *See* 52 Fed. Reg. 24,447 (1987).

Acting pursuant to the regulatory subdelegation, the DEA Administrator in late 1987 placed 4-methylaminorex temporarily on Schedule I. 52 Fed. Reg. 38,225 (1987); 21 C.F.R. § 1308.11(g)(5) (1988).[3] That action was taken after the required 30-day notice period, but without any scientific or medical recommendation from

[2] Under the temporary scheduling provision, those three factors include "actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." 21 U.S.C. § 811(h)(3).

[3] The drug 4-methylaminorex was not newly designed or created. A relative of aminorex (which is commercially available under the trade names Menocil and Apiquel), the present drug was patented in 1964 by McNeil Laboratories, Inc., as assignee of George Poos (*see* U.S. Patent No. 3,161,650), after several studies had shown its potency as an appetite suppressant, *see* Yelnosky & Katz, *Sympathomimetic Actions of CIS-2-Amino-4-Methyl-5-Phenyl-2-Oxazoline*, 141 J. Pharmacology & Experimental Therapeutics 180 (1963); Poos et al., *2-amino-5-Aryl-2-oxazolines. Potent New Anorectic Agents*, 6 J. Medicinal Chemistry 266 (1963).

the Secretary of HHS. *See ibid.*[4] The scheduling recommendation was later extended to April 15, 1989. 53 Fed. Reg. 40,061 (1988). The drug became a Schedule I controlled substance under the Act's permanent scheduling procedures effective April 13, 1989. 54 Fed. Reg. 14,799 (1989); 21 C.F.R. § 1308.11(f)(2).

D. Proceedings Below

Petitioners, who were indicted on January 11, 1989, raised their challenges to Euphoria's temporary criminalization in pretrial motions to dismiss the indictment. The district court denied the motions, acting pursuant to its jurisdiction under 18 U.S.C. § 3231. J.A. 2-3, 19. A divided panel of the Third Circuit affirmed petitioners' subsequent convictions. J.A. 27, 54.

The majority rejected petitioners' argument that Congress had acted unconstitutionally in delegating the temporary scheduling authority to the Attorney General. It reasoned that such a delegation would violate the Constitution only if Congress had neglected to provide the Attorney General with "an intelligible principle" by which the emergency authority should be exercised. J.A. 34 (quoting *Mistretta v. United States*, 109 S. Ct. 647, 659 (1989)). The court concluded that Congress had provided a sufficient constraint on the Attorney General's authority here, emphasizing that the 1984 amendment required a specific finding of public necessity, demanded consideration of three designated factors, and responded to a need for expedition in scheduling. J.A. 38-42.

[4] The DEA Administrator notified the Assistant Secretary for Health of his intention to schedule 4-methylaminorex temporarily. *See* 52 Fed. Reg. 38,225 (1987). While the Assistant Secretary did not respond to the notification, the Food and Drug Administration advised the DEA that it had no objection to the scheduling. *Ibid.* No other comments were received by the DEA. *Ibid.*

Next, the court of appeals held that Section 811(h) was not rendered invalid by the express congressional preclusion of judicial review of temporary scheduling orders. The court acknowledged that judicial review generally ensures that "'the will of Congress has been obeyed'" and that "the discretion of the executive officer to whom power has been delegated cannot be exercised in an unbridled manner." J.A. 41-42 (citations omitted). But it nevertheless concluded that review of temporary scheduling orders could be denied because Congress intended that such orders be enforced promptly, without the interference of judicial oversight. *Id.* at 42.[5]

In reaching its decision, the Third Circuit rejected the argument that a more searching constitutional review was appropriate in this case because the delegation empowered the Attorney General to criminalize a previously legal drug. J.A. 35-38. Recognizing that this Court has several times suggested that a higher constitutional standard is warranted for delegations of crime-defining authority, the court of appeals ruled that no new crime is actually created when a drug is criminalized. *Id.* at 38. In any event, the court decided that the Constitution does not place greater limits on the delegation of crime-defining power than on other delegations. *Id.* at 36-37.

Having found the statutory delegation constitutional, the court then concluded that the Attorney General had properly subdelegated his temporary scheduling authority to the DEA Administrator. J.A. 48. The court first determined that, although Congress did not expressly authorize subdelegation of the temporary scheduling authority, no such express authorization is necessary when a general subdelegation statute exists. *Id.* at 45. Noting that 28 U.S.C. § 510 allows the Attorney General to designate any other officer or employee to perform functions assigned by law to "the Attorney General," the court concluded that that provision was sufficient to support the subdelegation at issue in this case.[6]

Judge Hutchinson dissented on the ground that the temporary scheduling provision in 21 U.S.C. § 811(h) was unconstitutional because it concentrated "Congress's core legislative power to define primary criminal conduct [in] the Executive's chief law enforcement officer." J.A. 54. Judge Hutchinson emphasized the absence of any independent check on the Attorney General's unilateral power under this statute to define the crimes he then prosecutes. He explained that an individual defendant may not obtain even limited judicial review of the substantive basis for a temporary scheduling order: Congress's prohibition of judicial review is "absolute." *Id.* at 59. Judge Hutchinson concluded, "If this delegation is constitutional, I believe any individual protection provided by the constitutional prohibition against a general delegation of legislative power is a relic of the past. . . . [The majority's] opinion finds the non-delegation doctrine moribund. It leaves it dead." *Id.* at 65-66.

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[5] The court of appeals also suggested without deciding that, in some set of undefined circumstances, an individual defendant indicted under a temporary scheduling order might be able to challenge that order on due process grounds. J.A. 33 n.2 ("Arguably, such a defense might be raised by a defendant who was convicted for manufacture, distribution or possession of a temporarily scheduled drug that was later removed from the schedule because it did not meet the criteria for permanent scheduling of prohibited substances.") (citations omitted).

[6] The court also rejected petitioners' other claims, namely that (1) the regulation by which the Attorney General had purported to subdelegate his authority to the DEA was insufficiently precise; (2) the evidence against Lyrissa Touby was insufficient to support the jury's finding; and (3) the sentence imposed on Daniel Touby was improper. J.A. 43-44, 48, 51, 54.

SUMMARY OF ARGUMENT

1. The Constitution separates the fundamental powers of government—the legislative, the executive, and the judicial—in order to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). That separation forms the core of the system of checks and balances by which the three Branches limit each others' excesses. The temporary scheduling statute violates that constitutional structure in two distinct ways that are mutually reinforcing in their unconstitutional effect.

First, the statute combines the criminal law powers of the Legislative and Executive Branches to be deployed against individuals like petitioners. The Attorney General is now empowered to decide, in his sole discretion, which drugs present "an imminent hazard to the public safety." 21 U.S.C. § 811(h)(1). Having made that decision, he may then determine, again in his sole discretion, which people to prosecute for violating his own rule. The exercise of either of those criminal law powers poses significant threats to individual liberty, and thus each is subject to substantial constitutional restrictions. *See, e.g.*, *United States v. Bass*, 404 U.S. 336 (1971); *United States v. Ward*, 448 U.S. 242 (1980). When both powers are united in one person, the resulting aggregation exceeds constitutional limits. Such an aggregation is not only unprecedented, but also utterly unnecessary: the Secretary of HHS, who has no prosecutorial authority, could equally well make emergency scheduling decisions.

Second, the temporary scheduling statute flatly prohibits judicial review of the crime-defining power that Congress has delegated. That feature substantially increases the threat to individual liberty already created by the combination of executive and legislative criminal law powers, because it ensures that there will be no structural check whatsoever on the Attorney General's ability

to bring down the criminal process on virtually anyone of his choosing. In addition, the elimination of judicial review independently violates the separation-of-powers principle. It is well established that all congressional delegations of rulemaking authority must include "an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Mistretta v. United States*, 109 S. Ct. 647, 654 (1989) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). The "intelligible principle" that constrains Executive Branch power to create crimes must be judicially enforceable "so that a court [can] 'ascertain whether the will of Congress has been obeyed.'" *Skinner v. Mid-America Pipeline Co.*, 109 S. Ct. 1726, 1731 (1989) (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

2. The exercise of the temporary scheduling power by the DEA Administrator is also invalid for the related reason that the Attorney General was not authorized to subdelegate that power. The appropriate test of any subdelegation, of course, is congressional intent. *See, e.g.*, *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 358-67 (1942). That requisite intent is lacking here. The temporary provisions, by their terms, are limited to the Attorney General. Nor can previously enacted statutes that generally authorize subdelegation of the Attorney General's powers be read to extend to the temporary scheduling authority—which, even if constitutionally valid, is nevertheless both unprecedented and constitutionally extraordinary. When Congress delegates powers of such novelty and overriding significance, a clear legislative statement should be required before the Court infers an intent to allow the specified delegatee to reassign those powers to anyone of his choosing. *See United States v. Giordano*, 416 U.S. 505, 512-23 (1974).

ARGUMENT

Petitioners' convictions must be reversed because the criminal provision that they were found to have violated was invalid for two reasons. First, the separation-of-powers principle prohibits the massive concentration of criminal law powers effected by the temporary scheduling statute. Second, even if Congress could have conferred such power on the Attorney General, he in turn was not authorized to subdelegate that power.

I. THE CONSTITUTION'S SEPARATION OF POWERS PROHIBITS CONGRESS FROM CONFERRING UNREVIEWABLE POWER TO CRIMINALIZE DRUGS ON THE NATION'S CHIEF PROSECUTOR.

The concept of a government based on separated powers is the fundamental principle on which our constitutional system rests. As James Madison said at the outset, "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *The Federalist No. 47*, at 301 (Madison) (C. Rossiter ed. 1961). That view remains unquestioned two centuries later: "[t]his Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 109 S. Ct. 647, 658 (1989).

At the same time, "[t]he men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who . . . saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). To accommodate these competing structural concerns, this Court has adopted a "common sense" approach to separation-of-powers analysis. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). The

Court has thus focused on those practices that raise "concern[s] of encroachment and aggrandizement" (*Mistretta*, 109 S. Ct. at 659), precisely because their result is to threaten liberty by unduly concentrating powers that should be separated and checked. *Compare INS v. Chadha*, 462 U.S. 919 (1983), *and Bowsher v. Synar*, 478 U.S. 714 (1986), *with Morrison v. Olson*, 487 U.S. 654 (1988) and *Mistretta v. United States, supra.*

The present case involves a particular aspect of the separation-of-powers principle—the so-called "non-delegation" doctrine: "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892). *See also Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1812). But petitioners' claim, unlike prior non-delegation claims, does not challenge the specificity of the substantive standards that Congress established to govern the exercise of delegated powers. Rather, petitioners challenge the temporary scheduling statute's unprecedented concentration of judicially unreviewable crime-defining power in the executive officer who also has the crime-prosecuting power.[7] That challenge bears directly on "the accumulation of excessive authority in a single branch" (*Mistretta*, 109 S. Ct. at 659) and thus implicates the most basic separation-of-powers concerns. *See Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (3-judge court) ("[t]he claim of undue delegation of legislative power broadly raises the challenge of undue power in the Executive").[8]

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[7] For that reason, the considerations that have led this Court to reject all post-1935 challenges to the specificity of statutory criteria do not affect the analysis in this case. *See* note 14, *infra.*

[8] In fact, the threat to individual liberty is potentially greater when the Legislative and Executive Branches voluntarily join to-

In particular, the temporary scheduling statute contains two distinct—but nonetheless reinforcing—constitutional infirmities. First, it combines in one official the power to establish criminal offenses with the power to prosecute violations. Second, it bars judicial review of that official's crime-defining decisions. In our view, each aspect is invalid. The inclusion of both in a single statute clearly goes beyond constitutional limits.

A. The Attorney General's Unilateral Authority To Create Crimes and Prosecute Violators Is An Unconstitutional Aggregation of Power.

The temporary scheduling provisions empower the Attorney General to select any drug that he deems to present an "imminent danger to public safety" and, for a period of 18 months, to make its manufacture or sale a felony punishable by up to 20 years in prison (or even by life imprisonment in certain circumstances).[9] Then,

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gether to aggregate their powers than when one Branch poaches on another. At least in the latter situation, the poached-upon Branch is armed with structural powers (*e.g.*, the Executive has the veto) as well as political powers to help fend off encroachment.

[9] Contrary to the Third Circuit's suggestion, these provisions *do* give the Attorney General "the power to 'define primary criminal conduct.'" J.A. 37. As explained in the dissenting opinion, "[t]he crime for which a defendant is prosecuted is not . . . the manufacture, use or distribution of a drug that has the three characteristics set forth in § 812(b). Rather, it is the manufacture, use or distribution of a drug the Attorney General has scheduled under § 811(h)." J.A. 63. Indeed, Congress has adopted a separate statute that criminalizes "controlled substance analogues"—*i.e.*, drugs that have "a chemical . . . structure . . . which is substantially similar to the chemical structure of a controlled substance in schedule I or II." 21 U.S.C. § 802(32)(A)(i). Accordingly, temporary scheduling is needed only for substances that are essentially *different* from drugs that are already proscribed. *See generally*, Note, *The Emergence and Emergency of Designer Drugs: Subdelegation of the Power Temporarily to Schedule in Light of United States v. Spain*, 14 Am. J. Crim. L. 257, 267 (1988) ("[t]he statute allowing temporary scheduling is, in fact, designed to be a policy-making tool, with the broad guideline of averting imminent danger").

by shifting from his legislative to his executive powers, the same Attorney General can prosecute anyone of his choosing for committing the crime that he has just created. This unprecedented combination of legislative and executive authority over criminal law matters is unconstitutional.

1. The aggregation of criminal law-making and prosecutorial power strikes at the heart of the system of checks and balances that guarantee the rule of law. Any combination of legislative and executive authority in a single officer, whatever the subject, raises constitutional concerns.[10] In the civil sphere, however, those concerns may be overridden, as our history shows, to permit combined rule-making and rule-enforcing authority in a single officer, if there are sufficient safeguards against abuse (principally, judicial review) and sufficiently good reasons for the combination (principally, needed expertise). *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (Federal Communications Commission); *American Power & Light Co. v. SEC*, 329 U.S. 90, 104-06 (1946). But criminal law is different. The constitutional concern with keeping the government's legislative and executive powers over citizens in separate hands is at its apex when the powers at issue are the power to define conduct as criminal and the power to prosecute individuals for that conduct.

Each of those powers is constitutionally distinctive, because of its profound importance for individual liberty.

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[10] *See The Federalist No. 47*, at 302-03 (Madison) (C. Rossiter ed. 1961) (quoting Montesquieu) ("'When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner."); *see also* 1 W. Blackstone, *Commentaries on the Laws of England* 146 (7th ed. 1775) ("In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty.").

As to the crime-defining power, the Constitution recognizes its special nature in, for example, the prohibitions on *ex post facto* laws and bills of attainder. *See* U.S. Const., art. I, Sec. 9.[11] Moreover, whereas federal courts have long had a range of common-law-making authority in a number of areas (*Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2514 (1988)), this Court has for almost two centuries insisted that crimes be defined by Congress rather than courts: "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). *See United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (federal courts have no authority to fashion common law crimes). The constitutionally distinctive character of criminal laws is also reflected in the familiar rule of lenity for construing such statutes (*see Rewis v. United States*, 401 U.S. 808, 812 (1971)), in the due process limits on vagueness in criminal laws (*see Kolender v. Lawson*, 461 U.S. 352, 357 (1983)), and in the several opinions from this Court that have suggested a stricter application of the non-delegation principle to criminal rulemaking even in the context of judging the specificity of legislative standards (*see* pages 30-31, *infra*).

The power to prosecute crimes is perhaps even more extraordinary in constitutional terms than the power to define crimes. At least in the realm of domestic affairs, the authority to prosecute individuals is uniquely awesome among the Executive's powers. As then-Attorney

[11] The *ex post facto* prohibition is limited to criminal laws (*Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)), while the bar on bills of attainder extends somewhat more broadly to punitive laws (*see, e.g., Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 851-52 (1984); *Nixon v. Administrator of General Services*, 433 U.S. 425, 468-69 (1977)). Those proscriptions are so important that they restrict not only the federal government (art. I, § 9) but the States as well (art. I, § 10).

General Robert Jackson acknowledged, "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America." Jackson, "The Federal Prosecutor" (1940). The Constitution recognizes that fact by laying down extensive rules that, either on their face or as construed, specially restrict prosecutorial power at every stage—from investigation, through charging, trial, sentencing, and appeal. *See United States v. Ward*, 448 U.S. 242, 248 (1980).[12] This special treatment of criminal law-enforcement, as of criminal law-making, follows directly from the fact that criminal liability imposes a uniquely onerous stigma of community moral condemnation and alone can lead to punitive deprivation of life or liberty. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 537-40 (1979); *Addington v. Texas*, 441 U.S. 418, 428 (1979); *United States v. Bass*, 404 U.S. at 348.

[12] Thus, virtually all of the numerous guarantees of the Fifth, Sixth, and Eighth Amendments restrict government power only in criminal cases. In addition, the Fourth Amendment, as applied by this Court, has special force in the criminal arena: the exclusionary rule has never been applied in civil cases. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041-50 (1984); *United States v. Janis*, 428 U.S. 433, 447 (1976). Similarly, the Fifth Amendment's due process guarantee has distinctive meaning in criminal cases—*e.g.*, it requires proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *compare United States v. Regan*, 232 U.S. 37, 47-48 (1914) (civil cases generally require proof under preponderance standard); *Addington v. Texas*, 441 U.S. 418, 427-31 (1979) (even in civil commitment proceeding, reasonable doubt standard is not applicable). Moreover, Article III guarantees a jury trial in criminal but not civil cases (art. III, § 2), and the Sixth Amendment guarantee of jury trial in criminal cases applies in state courts (*Duncan v. Louisiana*, 391 U.S. 145 (1968)), whereas the Seventh Amendment limited guarantee of jury trial in some civil cases does not (*Walker v. Sauvinet*, 92 U.S. (2 Otto) 90 (1876)). Among other special protections afforded against prosecutions, the Court has held that the Constitution generally affords criminal defendants, but not civil litigants, various rights to relief from financial barriers to pursuit of their claims in court. *Compare, e.g., Mempa v. Rhay*, 389 U.S. 128 (1967); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956) *with United States v. Kras*, 409 U.S. 434 (1973).

When the two powers of crime definition and crime prosecution are combined, the structural protection of individual liberty is undermined at its core. The Constitution is designed to guarantee, in this most sensitive of areas, that before an individual is subjected to a criminal prosecution, two separate judgments will have been made —the first, that particular conduct should be criminalized; and the second, that the individual deserves prosecution for a violation. That guarantee is eliminated when the prosecutor himself is given the power to make both judgments.

The potential for "tyrannical" abuse in such a departure from the constitutional guarantee is both obvious and beyond constitutional limit. That potential is considerably greater than what then-Attorney General Jackson described in 1940 as "the most dangerous power of the prosecutor":

> that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.

Jackson, *supra*. A statute like the temporary scheduling provisions frees the Attorney General of the need even to search the statute books for a particular crime. Indeed, even if he knows full well that the targeted individual's conduct is not "the commission of a crime," the

Attorney General can nevertheless make that conduct criminal so that he will then have the discretion necessary to invoke the full panoply of investigative and prosecutorial powers against an individual who continues to engage in the newly proscribed conduct.

2. The amalgamation of crime-defining and crime-prosecuting authority in a single official appears to be entirely unprecedented in our history. No case supports such a combination. Equally important, until the temporary scheduling statute, as far as we have been able to discover, Congress had *never* combined unilateral crime-defining and crime-prosecuting power in a single executive official.

Thus, Congress has often granted executive departments and agencies the authority to promulgate regulations that govern private conduct, and some of the resulting regulations are enforceable through criminal prosecutions. *See, e.g., Yakus v. United States*, 321 U.S. 414 (1944) (upholding law making violation of Price Administrator's regulations a crime); *United States v. Grimaud*, 220 U.S. 506 (1911) (upholding law authorizing Secretary of Agriculture to promulgate rules whose violation was a crime). Moreover, a number of executive agencies and departments may bring civil suits to enforce their own regulations, even though the general rule is that litigation on behalf of the federal government is reserved to the Attorney General and the Department of Justice, 28 U.S.C. § 516. *See, e.g.*, H.R. Rep. No. 198, Part I, 98th Cong., 1st Sess. 50 (1983). But no regulatory agency or department, to our knowledge, has been permitted to bring criminal cases to enforce its regulations (or any statute). The prosecutorial power has been reserved to the Department of Justice, under the direction of the Attorney General.[13]

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[13] Section 547 of Title 28, U.S.C., states that, except as otherwise provided by law, the prosecution of all offenses against the United States is reserved to the United States Attorneys. Section 519

If prosecutorial authority has always been kept out of the hands of rulemakers, so too, apparently, the authority to make criminally enforceable rules has been keep out of the hands of the prosecutors. With the exception of the temporary scheduling provision, we have not found a single statutory grant to the Attorney General of authority unilaterally to promulgate regulations whose violation he may then prosecute. The permanent scheduling provisions come close, but even they give a veto power over any regulations to the Secretary of HHS. 21 U.S.C. § 811(b). From the critical standpoint of individual liberty, therefore, the permanent provisions provide an important check on prosecutorial power by insisting on an approval from a second official, who has no special concern with criminal law enforcement.

The Justice Department itself has affirmed the importance of separating the crime-defining and prosecutorial functions within the Executive Branch. As the Deputy Attorney General explained to Congress in 1983, "separation of the prosecutorial function from investigatory and regulatory functions has proven to be helpful in

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authorizes the Attorney General to supervise and direct the United States Attorneys in their functions; Section 518(b) authorizes the Attorney General to assign any case to any other officer of the Department of Justice; and Section 533 authorizes the Attorney General to appoint officials to detect and prosecute crimes. *See* Exec. Order No. 11396, 33 Fed. Reg. 2689 (1968) ("the Attorney General, as the chief law officer of the Federal Government, is charged with the responsibility for all prosecutions for violations of the Federal criminal statutes"); Fed. R. Crim. P. 48 (permitting dismissal of indictment, information, or complaint by the "Attorney General or the United States attorney").

As far as we are aware, the only congressionally permitted exception to the exclusive control over prosecutions exercised by the Attorney General is the independent counsel statute, 28 U.S.C. §§ 591-599. The independent counsel, of course, has no authority to promulgate rules of any sort, much less rules whose violation constitutes a crime. *See also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (courts may appoint private counsel to prosecute contempt).

assuring that litigation is initiated upon an objective, independent evaluation of the factual and legal basis of each case. This separation of functions ultimately results in better, more efficient government and the confidence of the public and the courts which the Department of Justice has earned." *Hazardous Waste Control and Enforcement Act of 1983*, Hearings before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 389 (1983) (letter from Deputy Attorney General Schmults). Similarly, three former Attorneys General explained to this Court in 1987, speaking particularly of criminal prosecutions: "One of the important functions of the Department of Justice is to provide a counterweight to government agencies that pursue a single programmatic mission." Brief for Edward H. Levi, Griffin B. Bell, and William French Smith as Amici Curiae, in *Morrison v. Olson*, 487 U.S. 654 (1988), at 14. *See also Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967) (emphasizing the difference between allowing agency to "implement its policy directly" and requiring that the "Attorney General must authorize criminal and seizure actions"). This important structural need for a prosecutorial check on executive rulemaking, of course, does not disappear simply because the rulemaking agency happens to be the Department of Justice.

3. The present aggregation cannot be justified on the ground of "practical necessity," which has been the controlling consideration in this Court's decisions rejecting claims of impermissible delegations. *See, e.g., J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. at 406 ("In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination."). In the first place, as noted earlier, petitioners' challenge does not go to the specificity of the standards pursuant to which Congress delegated this authority.

Consequently, the general recognition that "in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives" (*Mistretta*, 109 S. Ct. at 654) has no application here.[14]

Moreover, although the need for flexibility and expertise may well justify delegation of the temporary scheduling power to some executive officer (*see Mistretta*, 109 S. Ct. at 654-55; *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607, 674-75 (1980) (Rehnquist, J., concurring)), there plainly is no necessity for that authority to be vested in the Attorney General. On the contrary, there is an obvious alternative here—the Secretary of HHS. In addition to his scientific expertise in this field, the Secretary is directly and actively involved in the permanent scheduling process and thus is familiar with the problems and exigencies that might warrant emergency action. And to the extent that the Justice Department has relevant law-enforcement considerations to bring to bear on the decision, there is no reason why it cannot communicate its views to the Secretary.

Delegation to the Secretary of HHS would thus provide a vital, independent check on the prosecutor. At the same time, it need not be any less efficient than the process Congress has chosen. Even if it were somewhat less efficient, however, that small burden would hardly be sufficient reason to depart from the Constitution's guarantee of a government of separated powers. As the Court explained in a recent separation-of-powers case, "the fact

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[14] In view of the practical necessity for broad delegation criteria, this Court has uniformly rejected delegation claims since its 1935 decisions in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935), and *A.L.A. Schecter Poultry Co. v. United States*, 295 U.S. 495, 532-33 (1935). *See, e.g., Fahey v. Mallonee*, 332 U.S. 245 (1947); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Mistretta v. United States*; *Skinner v. MidAmerica Pipeline Co.*

that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . ." *INS v. Chadha*, 462 U.S. at 944.

4. The foregoing arguments would, we believe, invalidate any delegation of unilateral crime-defining power to the Nation's chief prosecutor. That is so regardless of whether Congress had authorized the courts to review the exercise of that power. Even with judicial review, the dangers of unilateral, discretionary choice in targeting individuals—coupled with the choice about which substances to schedule, made without the agreement of another Branch or officer, and perhaps with little development of a record for judicial review—is constitutionally unacceptable.

The temporary scheduling provisions, however, do not stop at combining the crime-defining and prosecutorial functions. They go on to insist that the Third Branch, the Judiciary, cannot review the product of this enormous aggregation of power. The result is that the combined powers are, in practical effect, entirely discretionary and plenary. It is hard to imagine a more fundamental departure from the constitutional guarantee of three separated Branches that would mutually check each other to preserve liberty. Thus, even if this unprecedented aggregation of criminal law powers in the Attorney General were not, by itself, unconstitutional, the simultaneous elimination of judicial review would render it invalid. Indeed, as we now argue, judicial review is constitutionally indispensable to the validity of any delegation of crime-defining powers, regardless of which executive official receives them.

B. Congressional Delegations of Criminal Lawmaking Power Must Authorize Judicial Review To Ensure That the Executive Is Acting In Accordance With The Necessary Substantive Standards Established by Congress.

The temporary scheduling statute, in paragraph (1) of 21 U.S.C. § 811(h), grants the Attorney General the power to declare substances illegal for up to 18 months, applying a standard of "imminent hazard to the public safety."[15] The statute then insulates that power from judicial scrutiny by declaring: "An order issued under paragraph (1) is not subject to judicial review." 21 U.S.C. § 811(h)(6). The statute thus permits "the Attorney General [to] act[] with unfettered discretion when making temporary scheduling decisions; he could add a substance as innocuous as aspirin to Schedule I and his decision could not be challenged." *United States v. Widdowson*, 916 F.2d 587, 591 (10th Cir. 1990). This preclusion of judicial review is unconstitutional.

1. The centrality of judicial review to the validity of congressional delegations of lawmaking authority follows directly from this Court's explanation of the delegation doctrine itself. Thus, the Court has insisted that any such delegation be made in accordance with "'an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Mistretta v. United States*, 109 S. Ct. at 654 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The primary purpose of that requirement, in turn, is to enable "a court [to] 'ascertain whether the will of Congress has been obeyed.'" *Skinner v. Mid-America Pipeline Co.*, 109 S. Ct. at 1731

[15] In applying that standard, the Attorney General is required to consider the substance's "history and current pattern of abuse," the "scope, duration, and significance of abuse," and "[w]hat, if any, risk there is to the public health," "including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." 21 U.S.C. § 811(c)(4)-(6), (h)(3).

(quoting *Yakus v. United States*, 321 U.S. at 426); *see also Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. at 686 (Rehnquist, J., concurring); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).[16]

Without judicial review, the bedrock constitutional requirement of an intelligible principle to constrain executive rulemaking would become nothing more than a paper guarantee, and the delegation doctrine could no longer serve its purpose of ensuring, through the independent judgment of the Judicial Branch, that the Executive's rulemaking stays within "the boundaries of [its] delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). But that is an intolerable result: at least when individual liberty is at stake, legislative standards cannot be treated as merely precatory, with citizens who may be subject to criminal prosecution being asked simply to trust in the Executive's compliance with the law. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws" in the courts when threatened with the imposition of government power. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-71 (1986).

The practical effect of denying judicial review in the present circumstances illustrates its constitutional necessity. In addition to the potential for scheduling drugs that should not be criminalized at all, there is perhaps an even greater potential for misusing the temporary scheduling authority—which allows only a Schedule I designation—to criminalize as the most serious drug a substance

[16] An additional purpose of the "intelligible principle" requirement is that "it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people." *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

(such as marijuana) that could properly be criminalized only at a less serious level. The consequences to defendants of even the latter sort of illegal action can be a substantial increase in years spent in prison. *See* 21 U.S.C. § 841(b). Yet the temptation to pursue that course must be strong for an Attorney General who is concerned about a particular substance and has only the Schedule I authority at his immediate disposal.[17]

In the face of this kind of potential for abuse, the experience of judicial review under the permanent scheduling provisions, though sparse, suggests that such review can in fact provide a meaningful check on Executive excess. Aside from the deterrent effect that judicial review may have on an overeager prosecutor, at least one order permanently criminalizing a substance has been successfully challenged by a university researcher on the ground that the DEA Administrator had applied the wrong criteria. *Grinspoon v. DEA*, 828 F.2d 881 (1st Cir. 1987); *cf. Reckitt & Colman, Ltd. v. Administrator, DEA*, 788 F.2d 22 (D.C. Cir. 1986) (rejecting distributor's challenge to permanent scheduling of drug). The risks of erroneous decision must be even greater where, as with the temporary scheduling provisions, the agency process is less thorough, more hurried, and not made in the shadow of eventual judicial review.

2. The court of appeals in this case, recognizing the constitutional difficulties caused by the temporary scheduling statute's bar on judicial review, tried to salvage the statute by stating: "[w]e do not foreclose the possibility that a defendant could raise, as a matter of due process, the defense that a substance was improperly scheduled

[17] This is hardly a fanciful concern. Another drug was put on Schedule I under the temporary scheduling provisions, even as an HHS Administrative Law Judge, acting under the permanent scheduling provisions, was in the process of deciding that the drug "must be categorized as a Schedule III substance." *United States v. Pees*, 645 F. Supp. 697, 700 (D. Colo. 1986).

because it does not fit within the standards that Congress established." J.A. 33 n.2. *Cf. United States v. Caudle*, 828 F.2d 1111 (5th Cir. 1987) (upholding post-indictment procedural challenge to temporary scheduling order without discussing statutory bar on judicial review). But even aside from the Third Circuit's failure to explain whether (and why) all or perhaps only some statutory violations would constitute due process violations,[18] the court's equivocal suggestion is simply an impermissible attempt to rewrite the statute. The language prohibiting judicial review gives no hint of such an exception to its absolute terms. In short, despite the "strong presumption" in favor of construing a statute to permit judicial review (*Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)), there is no basis for so reading the temporary scheduling provisions. *See Briscoe v. Bell*, 432 U.S. 404 (1977) (statute providing that agency determinations "shall not be reviewable in any court" precludes judicial review); *compare McNary v. Haitian Refugee Center, Inc.*, No. 88-1332 (Feb. 20, 1991) (bar on review of "a determination respecting an application" does not apply to general collateral challenges to systemic agency practices and policies); *Bowen v. Michigan Academy of Family Physicians*, *supra* (similar).[19]

[18] The court stated only that "[a]rguably, such a [due process] defense might be raised by a defendant who was convicted for manufacture, distribution or possession of a temporarily scheduled drug that was later removed from the schedule because it did not meet the criteria for permanent scheduling of prohibited substances." J.A. 33 n.2.

[19] If a right to judicial review were to be read into the statute, that should not be a basis for affirming petitioners' convictions. When the Attorney General scheduled the drug at issue here, he certainly must have thought that his actions were immune from judicial challenge. (Indeed, at no point in these proceedings has the United States ever acknowledged that the statute permits judicial review of scheduling orders to test their compliance with congressional standards.) Given the unique structural nature of a separation-of-powers claim, we believe that the appropriate standard for test-

In any event, the court of appeals' attempt to salvage the statute fails on its own terms. Whether or not the temporary scheduling provisions are read to permit judicial review as a defense to a prosecution, the statutory bar clearly precludes pre-prosecution review of the validity of any scheduling decision. That defect renders the statute's delegation invalid. For judicial review to serve its structural function, it must be available at a time that enables delegated legislative authority to be checked before it bears too heavily on individual liberty. Post-indictment review does not satisfy that requirement for several reasons.[20]

To begin with, the prospect of being subject to a criminal investigation and prosecution exacts a heavy toll, not only in fear and anxiety but in foregone activity that might be entirely lawful and indeed beneficial.[21] With the launching of a criminal investigation, moreover, an individual's privacy may be breached by the conduct of searches of his person, home, or office; his telephone may be wiretapped; and his papers and other possessions may be seized. The target may be summoned to appear before a grand jury. His friends, family, and associates

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ing the constitutional validity of the Attorney General's scheduling decision should look to the constraints under which he thought he was operating, and not those that are later read into the statute.

[20] This Court recently made a related point in *McNary v. Haitian Refugee Center, Inc., supra.* In holding that immediate judicial review of undocumented aliens' statutory and constitutional claims against the INS was available, the Court explained that forbidding review except in a challenge to a deportation order would be "tantamount to a complete denial of judicial review for most undocumented aliens." Slip Op. at 16.

[21] For that reason, declaratory judgments are generally available to test the validity of a criminal law if the threat of prosecution is not imaginary and speculative and if the issue is otherwise capable of judicial resolution. *See, e.g., Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 302 (1979); *Doe v. Bolton,* 410 U.S. 179, 188 (1973) (doctor "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief").

may be contacted by investigators or themselves subjected to searches, wiretaps, and summonses. Even before any arrest, therefore, great damage may be done to an individual and his reputation, and great expense might have to be incurred for the assistance of counsel.

An arrest or indictment starts an even more onerous process. "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion,* 404 U.S. 307, 320 (1971); *see Barker v. Wingo,* 407 U.S. 514, 533 (1972); *Klopfer v. North Carolina,* 386 U.S. 213, 222 (1967). The defendant may be detained in jail pending trial, and in addition to the terror of unwarranted imprisonment, "time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." *Barker v. Wingo,* 407 U.S. at 532. Even if out on bail awaiting trial, the indictment itself "may subject [the defendant] to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." *Klopfer v. North Carolina,* 386 U.S. at 222. In short, "[e]ven if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 814 (1987).

If judicial review of the validity of an Attorney General's criminal rule were unavailable except as a defense to a prosecution, all of the foregoing "oppression" (*Klopfer,* 386 U.S. at 222) would be suffered before there had been any opportunity for a judicial check on the propriety of the Executive's crime-creating decision that enabled the Attorney General to pursue these intrusive actions.

Of course, if the trial judge rejected the challenge, full-scale review at the appellate level would not be available until after the defendant had also undergone the rigors and anxieties of being tried and, if convicted, sentenced. The threat of being subjected to even a small part of these enormous burdens represents just the sort of exercise of governmental power over individuals that the constitutional separation of powers is designed to check. It would make a mockery of that guarantee to allow delegated criminal law-making powers to inflict those burdens on individuals before there was any opportunity to check whether the delegated authority had been properly exercised.

3. Like the combining of crime-defining and crime-prosecuting power, the preclusion of pre-prosecution judicial review of a criminal prohibition adopted by the Executive Branch is, to our knowledge, utterly unprecedented in the Nation's history. That historical fact alone forcefully demonstrates Congress's recognition of the fundamental importance of such review to the protection of individual liberty. Indeed, that general recognition has even been expressed with respect to the drug scheduling power in particular. Thus, in enacting the permanent scheduling provisions, 21 U.S.C. § 812 *et seq.*, which do allow for pre-enforcement judicial review, Congress highlighted that feature in response to the "concern [that] has been expressed before Congress with respect to the authority vested in the Attorney General regarding the scheduling and rescheduling of controlled dangerous substances." S. Rep. No. 613, 91st Cong., 1st Sess. 9 (1969).

Similarly, although the novelty of Congress's action in precluding review here means that this Court has never had to decide the issue, there is much in its opinions and those of its Members supporting a requirement of pre-prosecution judicial review of crime-defining rules. As a general matter, the Court has indicated that delegations of criminal rulemaking authority present heightened con-

stitutional concerns. For example, in *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947), the Court stressed that both cases in which the Court had struck down congressional delegations involved the "power to make federal crimes of acts that never had been such before." The Court recently reaffirmed the same point by relying on the important difference between the authority to set sentencing guidelines and the authority to "make crimes of acts never before criminalized." *Mistretta v. United States*, 109 S. Ct. at 655 n.7. *See id.* at 667 ("Guidelines . . . do not bind or regulate the primary conduct of the public"). *See also United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("deficiencies connected with vague legislative directives . . . are far more serious when liberty . . . [is] at stake") (citations omitted).

With respect to the specific issue presented here, moreover, Justice Harlan expressed the opinion that the failure to authorize pre-enforcement judicial review of Executive rules or policies carrying criminal penalties "would raise serious constitutional problems." *Oestereich v. Selective Serv. Sys., Local Bd. No. 11*, 393 U.S. 233, 243 (1968) (Harlan, J., concurring). *See also id.* at 240 (construing Selective Service Act to allow pre-induction judicial review). The Court itself had recognized the Term before *Oestereich* that post-indictment "review is beset with penalties and other impediments rendering it inadequate as a satisfactory alternative to [pre-enforcement review]." *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967). *See also Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-53 (1967).[22]

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[22] The Court in *Abbott Laboratories*, after setting forth various reasons why post-enforcement review was not adequate, stated that pre-enforcement review was required "absent a statutory bar." 387 U.S. at 153. That statement, made in a context where there was no statutory bar, does not purport to decide whether a statutory bar on pre-enforcement review would be constitutional. Of course, Justice

Furthermore, in those cases where the Court has upheld criminal lawmaking delegations, it has placed heavy emphasis on the opportunity for judicial review, which Congress had provided for *prior* to enforcement. For example, in *Yakus v. United States*, the Court held that it was itself "unable to find . . . an unauthorized delegation of legislative power," precisely because the Price Administrator was required to prepare a written "statement of the considerations" supporting his decision and, therefore, "Congress, the courts and the public [can] ascertain whether the Administrator . . . has conformed to [the standards prescribed by the Act]." 321 U.S. at 426.[23] And in *United States v. Rock Royal Co-Op*, 307 U.S. 533, 576 (1939), the Court, noting that the statute provided for pre-indictment judicial review, explained that "[e]ven though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority." [24]

Harlan, who wrote for the Court in *Abbott Laboratories*, insisted just one year later that preclusion of pre-enforcement review "would raise serious constitutional problems." *Oestereich v. Selective Serv. Sys., Local Bd. No. 11*, 393 U.S. 233, 243 (1968) (Harlan, J., concurring).

[23] In *Yakus*, the Court held that the provision of pre-indictment judicial review was constitutionally sufficient and that, therefore, Congress could prohibit post-indictment review. 321 U.S. at 431-37. The validity of that holding has subsequently been called into question. *See, e.g., Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring) (*Yakus* may rest on unique "war emergency" powers of Congress); *cf. United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) (post-indictment judicial review of earlier deportation order constitutionally required).

[24] The importance of pre-enforcement judicial review has also been emphasized in the court of appeals' decisions upholding the permanent scheduling provisions of the Controlled Substances Act against separation-of-powers challenges. Thus, in the first of those decisions, *United States v. Pastor*, 557 F.2d 930 (2d Cir. 1977), the court concluded that the Attorney General's discretion was not "unfettered," because, among other things, he was subject to the requirements of the Administrative Procedure Act, including its provision for judicial review: "These checks on the actions of the Attorney General provide sufficient assurance that his dual role will not be used unfairly." *Id.* at 941. *See also United States v. Gordon*, 580 F.2d 827, 840 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978) (availability of judicial review, along with defined congressional standards, provide "sufficient safeguards against the arbitrary control of drugs").

The cases relied on by the Third Circuit to support the conclusion that judicial review is dispensable here (J.A. 42) are completely inapposite. None of those cases had anything to do with the regulation of private conduct by criminally enforceable administrative rules. Moreover, the only one of those three cases where judicial review was actually circumscribed—and it was merely delayed, not eliminated—did not involve general rulemaking or the rights of individuals at all.[25] And while the Court did uphold a preclusion of pre-induction review of draft board determinations in *Clark v. Gabriel*, 393 U.S. 256 (1968) (per curiam), that case presented quite different constitutional considerations from those at issue here—not only because review was in fact available by habeas corpus before any criminal prosecution, but also because the case involved a large number of individualized agency decisions that depended on a "determination of fact and an exercise of judgment" in an area affected by military necessity. *Id.* at 258.

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[25] Thus, *Briscoe v. Bell*, 432 U.S. 404 (1977), concerned an individualized determination as to whether a *State* should be subject to the provisions of the Voting Rights Act; even then, the statute authorized a judicial challenge immediately after it was applied. 432 U.S. at 411. The other two cases are even more remote. *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), simply held that *consumers* did not have standing to seek judicial review of milk marketing regulations that were fully reviewable at the instance of those persons who were directly affected by them. And in *Johnson v. Robison*, 415 U.S. 361 (1974), the Court held that judicial review *was* available for the constitutional claim presented and was not eliminated by the statute barring review of certain individualized veterans' benefits determinations. The validity of that statute was not at issue.

4. There is no overriding justification to support the temporary scheduling statute's constitutionally extraordinary requirement that individuals be subjected to the burdens of criminal prosecution without prior opportunity for the Judiciary to review the legality of the criminal rules promulgated by the Attorney General. The only substantive interest even mentioned by the court of appeals in this case was the congressional interest in "prompt effectuation" of temporary scheduling orders. J.A. 42. But that interest is plainly insufficient to justify the preclusion of review here.

First, Congress's interest in prompt implementation of scheduling orders could be adequately accommodated without eliminating judicial review. (Congress's interest in expedition was itself a limited one: it provided for mandatory notice and a 30-day comment period before a drug could be scheduled. 21 U.S.C. § 811(h)(4).) [26] Promptness could be ensured by providing for expedited review of scheduling orders. *See Yakus v. United States*, 321 U.S. at 428-30; *Adamo Wrecking Co. v. United States*, 434 U.S. at 277-78. The pendency of such review, of course, "does not by itself stay the effectiveness of the challenged regulation." *Abbott Laboratories v. Gardner*, 387 U.S. at 156. Indeed, Congress may even have the power to insist that a scheduling order go into effect immediately, while providing for expedited judicial review. *Cf. Yakus v. United States*, 321 U.S. at 431-43 (delegation pursuant to emergency wartime powers can prohibit judicial stay of regulations pending review).

In any event, even if some delay were occasioned by judicial review of scheduling orders, that would not be a constitutionally sufficient justification for dispensing with it. As this Court has previously explained:

[26] In this case, approximately two months elapsed between the proposal to schedule 4-methylaminorex and its final scheduling. *See* 52 Fed. Reg. 30,174, 38,225 (1987). In addition, the drug had been created and patented more than 20 years earlier. *See* note 3, *supra*.

> There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

INS v. Chadha, 462 U.S. at 959 (citation omitted). In sum, the Constitution's structural checks on the exercise of criminal power over individuals cannot properly be eliminated or diluted, as Congress did in enacting the temporary scheduling statute under which petitioners were convicted and sent to prison.

II. THE ATTORNEY GENERAL WAS NOT AUTHORIZED TO SUBDELEGATE HIS TEMPORARY SCHEDULING AUTHORITY TO THE DEA.

Petitioners' convictions should also be reversed because the scheduling decision that formed the basis for their convictions was made by the DEA, which lacked the statutory authority to take such action. The temporary scheduling amendment, by its terms, extends only to the "Attorney General." In view of the importance of the power at issue, it is simply not reasonable to conclude, as did the court below, that Congress intended to allow the Attorney General to rely on any omnibus subdelegation authority to assign his powers to lower level employees of the Justice Department.

Executive subdelegation is permitted to the extent, but only to the extent, that Congress has authorized it. *See, e.g., United States v. Giordano*, 416 U.S. 505, 512-23 (1974); *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 358-67 (1942). In examining particular subdelegations, moreover, the Court has taken a pragmatic approach to

assessing the kind of evidence required to infer the needed authority. Thus, when the power in question is significant, the inquiry is more demanding. *See Giordano*, 416 U.S. at 515-16 (serious nature of wiretap authority suggests the need for "[t]he mature judgment of a particular, responsible Department of Justice official"). *Cf. Cudahy Packing Co. v. Holland*, 315 U.S. at 363-64 (inferring that Congress did not intend to allow subdelegation of administrative subpoena power, based in part on the coercive potential of the power).

In accord with this approach, we believe that the power at issue here is both so vast and so unbridled that congressional authority to subdelegate should be very clear before subdelegation is permitted. Generally speaking, of course, "[d]ue respect for the prerogatives of Congress in defining federal crimes prompts restraint" in assessing the reach of a criminal statute. *Dowling v. United States*, 473 U.S. 207, 213-14 (1985). That same restraint is equally appropriate when Congress delegates its crime-defining authority. The consequences are too important either to assume that Congress wanted low-level functionaries to take on such a task or, for that matter, to allow Congress to achieve such a result without expressly saying so. *See United States v. Widdowson*, 916 F.2d at 593 ("it seems extraordinary to assume that Congress intended to permit the temporary scheduling power to be delegated to a lesser administrator such as the head of the DEA"). *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (due process violated by citizenship requirement for federal employment imposed not by President or Congress but by Civil Service Commission).

The temporary scheduling provisions themselves reflect no congressional intent to permit subdelegation. The statute, by its plain terms, requires that the final decision regarding temporary scheduling be made by the Attorney General. 21 U.S.C. § 811(h)(1) ("If the Attorney General finds [that temporary scheduling is necessary], he may [order such scheduling].") In similarly plain terms, the statute further states that, in making such a decision, "the Attorney General shall be required to consider" specific aspects of the hazard presented. *Id.* § 811(h)(3). On the other hand, the statute contains not the slightest hint that Congress wanted other officials to share the Attorney General's authority.

Despite the express language of the temporary scheduling provisions, the Third Circuit concluded that subdelegation was authorized on the basis of a separate statute, which provides that the Attorney General "may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." 28 U.S.C. § 510. The court of appeals' reliance on section 510 was misplaced. As this Court has previously made clear, "[d]espite § 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated." *Giordano*, 416 U.S. at 514. And here, it simply strains credulity to think that Congress would have intended that such an important power would be exercised by "any employee" of the Justice Department, as section 510—which was enacted long before Congress had ever given any crime-defining authority to the Attorney General—would allow. "The decision to bypass ordinary safeguards against error and instead weigh only actual abuse, diversion and clandestine activities to determine whether temporary scheduling 'is necessary to avoid an imminent hazard to the public safety,' seems peculiarly a decision for an official of cabinet rank." *Widdowson*, 916 F.2d at 594 (citation omitted).

For the same reason, the subdelegation provision contained in the Comprehensive Drug Abuse and Control Act of 1970, 21 U.S.C. § 871(a)—which was not relied on by the Third Circuit—does not support subdelegation of the temporary scheduling authority. As previously noted, the

exercise of the permanent scheduling authority provided for in the 1970 statute itself was quite different from the temporary authority added in 1984: it was subject to a veto by the Secretary of HHS as well as formal rule-making procedures and judicial review. When Congress eliminated all of those requirements in the temporary provisions, it can hardly be supposed that Congress intended the new, unprecedented power to be exercised by "any officer or employee of the Department of Justice." 21 U.S.C. § 871(a). In the absence of some clear evidence to the contrary, Congress should not be understood to have authorized such a broad subdelegation of the unilateral and unreviewable power to criminalize lawful conduct.

In sum, the temporary scheduling provisions were meant to be exercised only by the Attorney General. His decision to subdelegate that power to the DEA was thus impermissible.

CONCLUSION

The judgments against petitioners should be reversed.

Respectfully submitted,

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APPENDIX

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FOOD AND DRUGS—DRUG ABUSE PREVENTION TEMPORARY SCHEDULING TO AVOID IMMINENT HAZARDS TO PUBLIC SAFETY 21 U.S.C. § 811(h)

(1) If the Attorney General finds that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to the requirements of subsection (b) of this schedule relating to the Secretary of Health and Human Services, schedule such substance in schedule I if the substance is not listed in any other schedule in section 812 of this title or if no exemption or approval is in effect for the substance under section 355 of this title. Such an order may not be issued before the expiration of thirty days from—

(A) the date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, and

(B) the date the Attorney General has transmitted the notice required by paragraph (4).

(2) The scheduling of a substance under this subsection shall expire at the end of one year from the date of the issuance of the order scheduling such substance except that the Attorney General may, during the pendency of proceedings under subsection (a)(1) of this section with respect to the substance, extend the temporary scheduling for up to six months.

(3) When issuing an order under paragraph (1), the Attorney General shall be required to consider, with respect to the finding of an imminent hazard to the public safety, only those factors set forth in paragraphs (4), (5), and (6) of subsection (c) of this section, including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution.

(4) The Attorney General shall transmit notice of an order proposed to be issued under paragraph (1) to the Secretary of Health and Human Services. In issuing an order under paragraph (1), the Attorney General shall take into consideration any comments submitted by the Secretary in response to a notice transmitted pursuant to this paragraph.

(5) An order issued under paragraph (1) with respect to a substance shall be vacated upon the conclusion of a subsequent rulemaking proceeding initiated under subsection (a) of this section with respect to such substance.

(6) An order issued under paragraph (1) is not subject to judicial review.

DEPARTMENT OF JUSTICE DRUG ENFORCEMENT ADMINISTRATION: GENERAL FUNCTIONS
28 C.F.R. § 0.100

The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Administrator of the Drug Enforcement Administration:

(a) Functions vested in the Attorney General by sections 1 and 2 of Reorganization Plan No. 1 of 1968.

(b) Functions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended. This will include functions which may be vested in the Attorney General in subsequent amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970, and not otherwise specifically assigned or reserved by him.

(c) Functions vested in the Attorney General by section 1 of Reorganization Plan No. 2 of 1973 and not otherwise specifically assigned.